2006

The Common Law of England in Virgina from 1776 to 1830

J. Thomas Wren
University of Richmond, twren@richmond.edu

J. THOMAS WREN

The Common Law of England in Virginia 1776 to 1830

The Virginia Court of Appeals embraced, on the whole, the English legal heritage, despite the violent separation from Great Britain in 1776. This loyalty to English precedents was an illustration of the conservative tenor of the Revolution in Virginia. The English common law continued to be revered because it was perceived to be a bulwark of English, and hence American, liberty. Adherence to English precedent also maintained stable rules of law, which in turn protected existing property rights. At the same time, however, the Court of Appeals was not slavishly devoted to the common law, and the court's departures from accepted precedent illustrate the nature of Virginia's revolutionary settlement.

The instances of judicial deviation from English rules of law during the Commonwealth's first decades were infrequent but illuminating. One example of the Virginia court's departure from English precedents occurred when the English rules clearly contravened republican principles. The Court of Appeals also consistently supported the will of the Virginia legislature, as expressed through statute, over traditional rules of law. This demonstrated a respect for manifest policy choices by Virginians over English traditions and was also an early indication of the court's perception of its limited role in the making of policy. Another instance where the Court of Appeals refused to blindly follow the English rules was when they did not comport with local conditions in Virginia. Likewise, the court refused to stand on technicality when to do so prevented the execution of an individual's obvious intent. Finally, the court also stepped in when the common law or statute provided no clear guidelines. In such cases, the Court of Appeals articulated a policy based upon principles of "reason."

Largely through the contributions of the Court of Appeals, then, the English legal heritage was adapted to the Virginia experiment. On the whole, traditional legal rules went unchallenged, evidencing a conservative respect for stability and property rights. Where the court did depart from English legal precedents, it was for the purpose of implementing legislative policy, or adapting the common law to Virginia's situation. The result was a legal system which was tradition-laden, but not tradition-bound; a conservative yet pragmatic jurisprudence which was to define Virginia's approach to the new order.

Theoretically, at any rate, once the Virginia colony slashed its ties with the mother country, the source and authority of the British legal system were extinguished. In this veritable "state of nature," it was the duty of the new sovereign

and independent state to fill the vacuum by establishing a new legal order.[1] One of the first orders of business for the Virginia Convention in May 1776 was to address the matter of the continued validity in Virginia of the British statutes and the English common law, that amalgam of rights, duties, and liabilities built up through centuries of judicial decisions in the English courts which formed the basis for the vast majority of the substantive law that governed the rights and obligations of all English subjects. The Virginia Convention did not hesitate and immediately embraced the English system. In order "to enable the present magistrates and officers to continue the administration of justice ... till the same can be amply provided for," the Convention specifically adopted the English common law, and all applicable English statutes passed before 1607, "until the same shall be altered by the legislative power of this colony."[2] The end result was, as St. George Tucker described it, "That the common law of England, and every statute of that kingdom, made for the security of the life, liberty, or property of the subject, before the settlement of the British colonies, respectively, so far as the same were applicable to the nature of their nature and circumstances, respectively, were brought over to America.. .".[3]

The hasty adoption of the essence of the English legal system at the very moment the Virginians were engaged in a violent revolt against that government is not the contradiction that it would at first appear. In many ways the Virginians, taking their cue from the British "Opposition" writers of the early eighteenth century, believed that their revolution was not a revolution at all but merely a last, desperate attempt to recover the traditional English liberties that had been lost at the hands of a "corrupt" English government.[4] One of the bulwarks of those traditional English liberties was the substance and procedure of the English common law. Accordingly, the common law was claimed as the "birthright of American citizens."[5] The Virginia Court of Appeals was fully aware of the libertarian nature of the common law inheritance. As Judge Tucker phrased it, "No man I trust would be more jealous than I of the danger of preserving any part of the theory of monarchy in our Commonwealth; but the rights of individuals, upon whatever theory originally founded, after having settled into the known law of the land for six centuries, in England, and after being considered in a similar light in this country,

[1] *St. George Tucker,* Blackstone's Commentaries (1803), vol. 1, app. E, p. 430.

2 Stat, of May 1776, c. 5, § 6, *W. W. Hening,* Statutes at Large of Virginia, vol. 9, p. 126 [hereinafter Hening].

[3] *St. George Tucker,* Blackstone's Commentaries, vol. 1, app. E, p. 432. See generally *W. H. Bryson,* English Common Law in Virginia in Journal of Legal History, vol. 6, pp. 249-56 (1985); *W. H. Bry son,* Virginia Civil Procedure (2005), § 2.02.

[4] See generally *Bernard Bailvn,* The Ideological Origins of the American Revolution (1967).

[5] *J. R. Pole,* Equality in the Founding of the American Republic, in *G. S. Wood/J. R. Pole,* edd., Social Radicalism and the Idea of Equality in the American Revolution (1976), p. 18; *P. Miller,* The Life of the Mind in America: From the Revolution to the Civil War (1965), p. 122.

from its first foundation, ought not to be shaken, unless the imperative voice of the constitution, or of the legislature, shall compel it to be done."[6]

There was also a more pragmatic reason for adhering to the known rules and procedures of the common law which the Court frequently articulated. That was the idea that it was important that the law remain predictable. Nowhere was the rationale for this position more cogently arrayed than in the early case of *Commonwealth* v. *Posey,* which dealt with a 200-year old precedent which had been definitive in construing the English statute regarding the benefit of clergy. (The "benefit of clergy" was a privilege of exemption from execution in a capital crime granted originally to clergymen but later expanded to include many others.) In *Posey,* Judge William Fleming gave the essential rule: "precedents, so long acquiesced in, cannot be overturned, without more danger than benefit, as no point will ever be settled."[7] But it was Judge Peter Lyons who expressed the underlying rationale: "The security of men's lives and property require that [the earlier cases] should be adhered to: for precedents serve to regulate our conduct, and there is more danger to be apprehended from uncertainty, than from any exposition, because, when the rule is settled, men know how to conform to it; but when all is uncertain, they are left in the dark, and constantly liable to error .. .".[8] The importance of this holding did not go unrecognized. Nearly fifty years later, in 1833, Daniel Call, in publishing his edition of this case, added a postscript that "No cause decided, since the revolution, is more important than this, as it fixes, by the opinion of a large majority of the judges, distinguished for their patriotism, independence, and ability, a principle necessary for the tranquillity of society and the safety of the general transactions of mankind, namely, that a settled construction of a statute forms a precedent, which should be adhered to as part of the law itself; and ought, upon no criticism of words, to be departed from. Accordingly, the decisions of the court [of appeals], since that period, abound with instances of the same kind, but none of them state the ground and reason of it with so much force .. .".[9]

Call was correct about the Court of Appeals' continued respect for the rules of property as established by the English cases. The reports teem with similar professions of allegiance to the accepted common-law interpretations of legal doctrines. In 1827, the Court refused to overrule a longstanding interpretation of the effect of language creating a "future interest" in property, even though the legislature had shown a clear dissatisfaction with the judicial reasoning in such cases. The Court, normally deferential to legislative wishes, here refused to change its position (in a case that arose prior to the enactment of the corrective statute). Judge Dabney Carr articulated the Court's reasoning. While a statute was prospective, and gave everyone notice of the new rule, a judicial decision was by its very nature retrospective.

6 *Read v. Read,* 5 Call 160, 173 (1804).

ı *Commonwealth* v. *Posey,* 4 Call 109, 119- 120 (1787).

8 *Id.* at 120.

9 *Id.* at 124.

"If we say that these decisions [that the Court has held to over the years] are wrong/' asserted Carr, "all the estates which have been settled, all the contracts which have been made, all the titles which rest on the foundation of their [i.e., the former cases'] correctness, are uprooted."[10] Nor did Carr stop there. If all those decisions were overturned, it would be impossible to foresee "the extent of the mischief." "But, only open the door," concluded Carr, "[and] proclaim to the world that all which has heretofore been done is wrong; and then we shall see the wild uproar and confusion among titles, which will follow. Is it not better to prevent this, by holding on in the course we have so long run?"[11]

So strong was the loyalty to precedent that the Court was willing to follow a common-law rule even when the rationale underlying that rule had been lost in the mists of time. As late as 1829, we find Judge William Cabell intoning: "It cannot be admitted, that a law ceases to exist, merely because the reason which gave rise to its adoption has ceased. If this were admitted, we should demolish at once much of the venerable fabric of the common law."[12] And Judge John Green, searching in 1830 for the reasoning behind the doctrine that all judgments "relate back" to the first day of the judicial term, finally threw up his hands in despair. "This general principle of the common law, like many others, is of such remote antiquity and so long recognized without dispute that the reasons and policy are, in great degree, left to conjecture."[13] Even more revealing are the cases where the judges followed the common-law even in the face of their own sense of justice. Throughout the first five decades of the new republic, judges subsumed their own views to the interest of upholding precedent.[14] Perhaps Spencer Roane summed it up best in the case of *Claiborne* v. *Henderson* in 1809. Roane noted that there are "innumerable instances to be found in the books of a reverence for decisions and rules of property which have been established by the concurrent decisions of successive judges and acted under for a long series of time. They ought to be adhered to as the sine qua non of all certainty and stability in the law, the private opinion of any single judge to the contrary notwithstanding."[15]

Given this reverence for common-law precedent, both in terms of its protections of individual liberties and because of the fear of disruption from an overturning of established rules, it should come as no surprise that the Virginia reports abound

io See, e.g., *Bells* v. *Gillespie,* 5 Randolph 274 (1827); *Minnis* v. *Aylett,* 1 Washington 300 (1794); *Boswell and Johnson* v. *Jones,* 1 Washington 322 (1794); *Jiggets* v. *Davis,* 1 Leigh 368 (1829); *Blow* v. *Maynard,* 2 Leigh 29 (1830); *Coutts* v. *Walker; 2* Leigh 268 (1830); *Cole* v. *Scott, 2* Washington 141 (1795); *Claiborne* v. *Henderson,* 3 Hening & Munford 322 (1809).

h *Bells* v. *Gillespie ,* 5 Randolph 274, 285 (1827).

12 *Jiggets* v. *Davis,* 1 Leigh 368, 426 (1829).

13 *Coutts v. Walker, 2* Leigh 268, 276 (1830).

14 See, e.g., *Cole* v. *Scott, 2* Washington 141 (1795); *Claiborne* v. *Henderson,* 3 Hening & Munford 322 (1809).

15 *Claiborne* v. *Henderson,* 3 Hening & Munford 322, 376 (1809).

with professions of allegiance to the common law.[16] Indeed it is logical that this should be so. As one commentator has put it, "English precedents had been for two centuries the ways and woof of the Virginia system, and it was neither possible nor desirable to cast them aside."[17]

Perhaps the most telling indicator of the continuing role of the English common law in Virginia's system came in the early 1830s, when Henry St. George Tucker advised practicing attorneys concerning the matter of rent payments when the lessor died before the rent payment was due. Under English law, the death of the lessor absolved the renter from liability to pay rent, unless the lease specifically provided otherwise. Although common sense dictated that this should not be the outcome, Tucker warned lawyers that "until... some adjudication shall justify us in department in practice from English authority, it will be always safest in practice to make reservations of rent in conformity with their decisions .. ,".[18]

Given the clear commitment in Virginia to English precedent, what becomes most interesting and informative are the exceptions to this common-law allegiance. It is manifest that only a deeply-held belief in some countervailing value or circumstance could induce the Virginia Court of Appeals to depart from its respectful attitude toward the common law.

Interestingly, one rationale for deviating from the common law is expressed specifically in terms of republicanism. In the 1806 case of *Baring* v. *Reeder,* Judge Roane acknowledged that "I consider myself bound to pare down the governmental part of the common-law of England to the standard of our free republican constitution [19] St. George Tucker elaborated in his annotation to Blackstone's Commentaries: "every rule of the common law, and every statute of England, founded on the nature of regal government, in derogation of the natural and unalienable rights of mankind or inconsistent with the nature and principles of democratic governments were absolutely abrogated, repealed, and annulled by the establishment of such a form of government in the states, respectively. This is a natural and necessary consequence of the revolution and the correspondent changes in the nature of the governments [20]

A further subtlety was inherent in this perception of the common law in light of republican principles. Even when the Virginia courts were at the height of their "homage-paying" to the English precedents, there was a subtle but very important distinction between *reliance* upon English decisions and their *authority* . The Revo-

'6 *C. F. Hobson,* ed., The Papers of John Marshall, vol. 5, Selected Law Cases (1987), pp. 458, 462 [hereinafter *Hobson,* Selected Law Cases]; *D. J. Mays,* Edmund Pendleton (1952), vol. 2, p. 301.

[17] *Mays,* Edmund Pendleton, vol. 2, p. 300.

[18] *Henry St. George Tucker,* Commentaries on the Laws of Virginia (1831), vol. 1, bk. 2, p. 25.

19 *Baring* v. *Reeder,* 1 Hening & Munford 154, 161 (1806).

[20] *St. George Tucker,* Blackstone's Commentaries, vol. 1, app. E, pp. 405-406.

lution, argued St. George Tucker, "by separating us from Great Britain forever, put an end to the *authority* of any future decisions or opinions of her judges and sages of the law in the courts of this Commonwealth; those decisions and opinions, I make no doubt, will long continue to be respected in Virginia, as the decisions of the wisest and most upright foreign judges; but from the moment that Virginia became an independent Commonwealth, neither the laws, nor the judgments of any other country, or its courts, can claim any *authority* whatsoever in our courts.. .".[21] This, in the end, was exactly the point Roane was making in *Baring* v. *Reeder:* "On such rules of the common law ... as are neither affected by a change in the form of government, nor by a variation in the circumstances of character of the nation, I am free to avail myself of the testimony of able judges and lawyers of that country ... I am not willing that an appeal to my pride, as a citizen of independent America, should prevail over the best convictions of my understanding ... I wish it, however, to be clearly understood that I... would not receive even them, as binding authority. I would receive them merely as affording evidence of the opinions of eminent judges as to the doctrines in question ... ".[22]

A more obvious exception to the preeminence of the English common law in the court decisions of Virginia occurred when the English precedents were displaced by statutory provisions. The superiority of enactments of the Virginia General Assembly to any common-law doctrine was a commonplace. This was made express in the statute adopting English common law and statute in May 1776, when it was declared that the English law was to remain "in full force, until the same shall be altered by the legislative power of this colony."[23] The Court of Appeals was assiduous in upholding this doctrine of legislative supremacy where there was a direct conflict between statute and common law. *Whittington* v. *Christian* is a typical example. That case, decided in 1824, had to do with a technical error in an action of ejectment. When the defendant sought to have the case dismissed under the common-law rule, the Court looked to the more lenient provision of the Virginia statute. "It is true," admitted Judge Green, "that this construction of the statute and the rule of the common law referred to cannot exist together. The consequence is, that the statute abrogates the rule of the common law in toto .. .".[24] Similarly, in *Templeman* v. *Steptoe*, Judge Tucker noted in 1810 that under the 1785 statute of descents, it was "too plain to require proof, that... all former rules and canons of inheritance and succession to estates within this Commonwealth, whether established by common law, or by statute, were rescinded, abrogated, and annulled, and that they cannot be revived in any manner but by some express legislative provision for that purpose."[25]

21 *Ibid.,* vol. 5, p. 436, n. 1.

22 *Baring* v. *Reeder,* 1 Hening & Munford 154, 162 (1806).

23 Stat, of May 1776, c. 5, § 6, Hening, vol. 9, p. 127.

24 *Whittington* v. *Christian ,* 2 Randolph 353 (1824).

25 *Templeman* v. *Steptoe,* 1 Munford 339 (1810). For similar examples, see *White* v. *Jones, 4* Call 253 (1792); *Bennet* v. *Commonwealth,* 2 Washington 154 (1795); *Shaw* v. *Clements,* 1

Within the parameters of absolute statutory superiority in areas of actual conflict, however, there was still room for a considerable amount of reliance upon common-law principles and remedies. Oftentimes Virginia statutes were exact copies of or derivative from English predecessors. In such cases, the relevant common-law doctrines were often used to inform and illuminate the statutory provisions.[26] The Court of Appeals was also quite careful when a new statutory remedy was enacted that deviated from traditional common-law rights. In such cases, the Court acknowledged the statute, but took special care that the common-law remedies were also available, unless the statute clearly abrogated those rights.[27] Thus, in 1798, when a debtor sought to stave off a creditor because he had not complied with the statutory requirements on a bond, Judge Pendleton for the Court held that it was "immaterial whether the creditor had or had not a remedy by motion, under the Act of Assembly, since the act having no negative words, the creditor had his election to pursue the statutory mode, or his common-law remedy on the bond."[28] Ten years later, Judge Roane commented with respect to an alleged fraudulent transfer that "the statutes in question are merely superogatory in relation to the common law.. ,".[29] And, in 1825, the Court held that the statute regarding proof of a will "is only cumulative, and does not deprive any party of remedy at common law."[30] Similarly, the Court held that "when a statute gives a remedy without prescribing a particular mode of proceeding, the mode of the common law is to be pursued."[31]

Another situation in which the Court of Appeals was willing to overcome its predilection for common-law precedent was when the local conditions did not favor its application.[32] As a contemporary commentator noted in 1821, "The common law of England is, at this day, the law of Virginia, except so far as it has altered by statute, or so far as its principles are inapplicable to the state of the country. It adopts itself to the situation of society, being liberalized by the courts according to the circumstances of the country and the manner and genius of the people."[33] Judge Roane added that "in applying ... [the common law] we must

Call 429 (1798); *Fleming* v. *Boiling* , 3 Call 75 (1801); *Branch* v. *Bowman,* 2 Leigh 170 (1830); *Peasley* v. *Boatwright,* 2 Leigh 195 (1830); see also, e.g., *Henry St. George Tucker,* Commentaries, vol. 1, bk. 2, p. 86.

26 *Jackson* v. *Sanders,* 2 Leigh 109, 114- 115 (1830).

27 *Braxton* v. *Wins low,* 1 Washington 31 (1791); *Asbury* v. *Calloway,* 1 Washington 72, 74 (1792); *Gordon admrs.* v. *Justices of Frederick,* 1 Munford 1 (1810).

28 *Booker's exrs.* v. *M'Roberts,* 1 Call 243, 244 (1798).

29 *Fitzhugh* v. *Anderson,* 2 Hening & Munford 289, 303 (1808).

30 *Smith* v. *Carter,* 3 Randolph 167 (1825). See also *Johnston* v. *Meriwether,* 3 Call 523 (1790); *Beale* v. *Downman,* 1 Call 249 (1798); *Hooe* v. *Tebbs,* 1 Munford 501 (1810); *Henry St. George Tucker,* Commentaries, vol. 2, pp. 13, 372. But see *Taylor v. Beck,* 3 Randolph 316 (1825).

31 *Braxton* v. *Winslow, 4* Call 308, 318 (1791).

32 *Miller,* Life of the Mind, pp. 125- 127; *O.* and *M. F. Handlin,* Commonwealth (1947), pp. 134-135.

adapt [it] to the circumstances of the case ... so as to effect a reasonable and substantial compliance therewith, rather than a literal one."[34]

One distinguishing circumstance in the new commonwealth was the variation in the court structure between Virginia and England. Judge Pendleton addressed the issue in 1792 in *Thornton* v. *Smith* when he held that the requirement of asserting a court's jurisdiction in the pleadings was not necessary in Virginia. Pendleton argued that the English rule "grew out of the local situation of the inferior courts in that country, and was grounded upon considerations in which ours totally differ from theirs." After discussing the confusing mishmash of jurisdictions in England and the straightforward statutory scheme in Virginia, Pendleton concluded that in this case "the [English] precedents cannot bind us."[35] A similar situation confronted Judge Tucker in the 1809 case of *Nimmo's exr.* v. *Commonwealth*. The question there was whether a decedent's executor was presumed to know of pending judgments which might bind the estate. Tucker acknowledged that presumption applied in England. "But," he interjected, "it is not every common-law rule, founded upon the judicial system of that country, that can be deemed, in strictness, applicable to the circumstances and situation of this." After noting that there were only four courts of record in England compared to over two hundred in Virginia, Tucker concluded: "Can it be supposed, that under such circumstances ... an executor must at his peril take notice of all judgments against the testator in his lifetime, in what court, or part of the state soever, the same may be entered? I conceive not ... ".[36] Similarly, the dispersed nature of Virginia courts forced some departures from traditional requirements. Often pleading requirements were relaxed. "Considering the circumstances in this country," noted the Court, "and the dispersed situation of the attorneys and their clients who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules of practice."[37]

The demands of settling a new country also affected the substantive rules of the common law. In England, a mere tenant on the land was limited as to his utilization of permanent resources of the land such as timber. If he were to cut more trees than was reasonably necessary for fencing and the like, he was liable to the owner of the land for "waste." But in Virginia, where there was a more compelling need to tame and make productive the land, the rule was different. In *Findlay* v. *Smith,* a life tenant was permitted, in 1818, to extract unlimited quantities of salt, and to use

33 William Munford in *Findlay* v. *Smith,* 6 Munford 134, note (1818).

34 *Coleman, exr.* v. *Moody,* 4 Hening & Munford 1, 20 (1809).

35 *Thornton* v. *Smith,* 1 Washington 81, 83-84 (1792).

36 *Nimmo's exr.* v. *Commonwealth, 4* Hening & Munford 57, 66 (1809).

37 *Downman* v. *Downmans exrs.,* 1 Washington 26, 28 (1791), VK //. *Bryson,* Virginia Law Reports and Records, 1776-1800, in *A. Wijffels,* ed., Case Law in the Making (Comparative Studies in Continental and Anglo-American Legal History, Band 17/11, 1997), p. 101; see also *Tabb* v. *Gregory, 4* Call 225, 229 (1792).

all of the woodland, if necessary, to supply fuel for the operation. As Judge William Cabell explained, "the law of waste, in its application here, varies and accommodates itself to the situation of our new and unsettled country."[38] Similarly the common-law right of a purchaser of the land to the tenant's growing crops was questioned in Virginia, "where lands are seldom let out upon leases .. .".[39]

In sum, the Virginia Court of Appeals was willing to change common-law rules and procedures to conform to the requirements of Virginia experience.[40] On the other hand, such deviations were relatively infrequent and always accompanied by an explanation of the circumstances which demanded the variance.

Another exception to the tradition of common-law preeminence in the Virginia courts was broad in concept but rather strictly limited in practice. It arose because there were inevitably times when the common-law precedents gave no guidance, or provided conflicting rules of law. In such cases, by default, the Court had to step in and make a policy decision with little guidance from the precedents. Such was the case of the interpretation of an insurance contract in *Bourke* v. *Granberry* in 1820. There, the precedents were diverse and conflicting, forcing Judge Roane to finally conclude, "We are to judge for ourselves in this chaos of judgments, and we submit the result of our best deliberations."[41] Judge Coalter faced a similar situation in 1829 regarding the admissibility of proof of handwriting in a forgery case. "The decisions, so far as I have examined them, are not, I think, very consistent with the general rules of evidence, or with each other, or with the principles by which they profess to be governed; nor, indeed, have I as yet been fully able to comprehend those principles."[42] In such cases, the Court had no alternative but to strike out on its own without solid guidance from the precedents. On the whole, however, the Virginia Court of Appeals was very circumspect in availing itself of the opportunity to claim a lack of positive direction from prior cases, thus justifying the creation of a new policy initiative by judicial fiat.[43]

Despite the tradition of respect for precedent, there was at least one particular area where the Court of Appeals did evince a resistance to the pattern of adherence to common-law rules, in the interpretation of wills. Cases involving wills provided much of the grist for the mills of justice in the late eighteenth and early nineteenth

38 *Findlay* v. *Smith,* 6 Munford 134, 142 (1818); see *Henry St. George Tucker,* Commentaries, vol. 1, bk. 2, pp. 4, 50.

39 *Crews* v. *Pendleton,* 1 Leigh 297, 302 (1829). See also *Ross* v. *Poythress,* 1 Washington 120 (1792) [regarding lack of hard money in Virginia].

40 *G. R. Wood,* Creation of the American Republic (1969), p. 296.

41 *Bourke* v. *Granberry,* Gilmer 16, 26 (1820).

42 *Rowt's admr.* v. *Kile's admr.* , 1 Leigh 216, 224-225 (1829).

43 In only two cases does the Court intimate that it was primarily "result-oriented." In *Martin* v. *Lindsay's admr.* , Judge Brooke said, "It is of more importance to decide causes in this court, than to settle or unsettle the law." 1 Leigh 499, 513 (1829). And in *Coleman exr.* v. *Moody,* Judge Roane noted: "We do not sit here to lay down mere abstract propositions, but to administer justice." 4 Hening & Munford 1, 20-21 (1809).

centuries. And in most will cases, the standard deference to English precedent was evident. Indeed, one commentator has noted that "owing to their great complexity, will construction cases came before the appellate court in disproportionate numbers. They afforded numerous occasions for the bar and bench to display their mastery of the abstruse doctrines of property law and the technical rules for construing wills that had evolved with ever greater refinement in a multitude of cases. Not surprisingly, the string of English citations was longest in will cases."[44]

One aspect of will construction, however, provided an exception to this rule. This occurred in the cases involving the interpretation of the intent of the testator (the writer of a will) in the application of the provisions of the will. The resistance to common-law rules in such cases was partially justified in the familiar terms of a lack of clear guidance from the common-law precedents. In a 1792 case, the court expressed its willingness to follow the traditional rules of will construction if it could find them. "If we could discover those settled rules of construction," lamented the Court, "we would pursue them. But, after all our researches, we are much inclined to affirm ... 'that cases on wills serve rather to obscure, than illuminate questions of this sort'."[45] Two years later Judge Edmund Pendleton reiterated this argument. "In disputes upon wills ... which depend ... on the intention of the testator ... adjudged cases have more frequently been produced to disappoint, than to illustrate intention." As a result, Pendleton concluded that the proper way to decide such cases was not to rely upon precedent, but upon "the state and circumstances of each case."[46]

But this reliance upon the crutch of a lack of "settled rules of construction" was a bit disingenuous. For in the same case that Pendleton decried a lack of established precedent, he went on to reveal the real theory underlying his approach to such cases. "I am free to own," admitted Pendleton, "that where a testator's intention is apparent to me, cases must be strong, uniform, and apply pointedly before they will prevail to frustrate that intention."[47] In supporting the perceived intention of testators over technical rules of law, the Court of Appeals was not so much rejecting precedent as it was acknowledging and effectuating the clear aims of common men, unschooled in the law. Judge Carr in 1830 stated the reasoning of the Court simply and directly. "The enquiry is to the meaning of the bequest: it is a pure question of intention. There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms and legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the

[44] *Hobson*, *ed*., Selected Law Cases, p. 463. See e.g., *Roy* v. *Ganietî,* 2 Washington 9 (1794).

45 *Kennon* v. *M'Roberts* , 1 Washington 96, 102 (1792).

[46] *Shermer* v. *Shermer's exrs* ., 1 Washington 266, 271 -272 (1794).

47 *Id,*. at 272.

words he has used."[48] Carr's statement, although more eloquent, was really echoing the same point made by the Court in 1792. In that year, the Court in *Kennon* v. *M'Roberts* set up a simple rule of interpretation: "if the testator use legal phrases, his intention should be construed by legal rules. If he uses those that are common, his intention, according to the common understanding of the words he uses, shall be the rule."[49]

Perhaps the most illuminating cases where a testator's intent clashed with a legal rule came when there was a devise (i.e., a testamentary disposition of land) of real property to the testator's children. In 1797, for example, John Guthrie, an uneducated man, left land to his eldest son James. Everything about the will indicated Guthrie's intention to leave the land to James absolutely, without limitation or restriction. But Guthrie did not devise the land to James "and his heirs," and by leaving out those three key words, the common-law rule had it that James took the land only during his lifetime, and that at his death it went not to James' heirs or his own devisees, but to the "residuary legatee" of Guthrie's will. The Court of Appeals in this case concluded that "if we consult common sense and the reason of mankind, we shall be satisfied that where a man gives an estate in lands, without limitation or restraint, he means to give his whole interest."[50] And so the Court continued to hold until the problem was remedied by a statutory abrogation of the common law.[51]

Despite examples of the Virginia Court of Appeals effecting a testator's intent over technical rules of law, there were acknowledged limitations to this policy in both theory and practice. Although it was a familiar refrain throughout the period, Judge Carr perhaps articulated it best in 1825: "In the constructions of wills," said Carr, "the cardinal point, the polar star, is the intention of the testator; and this being clear, must be pursued, *unless it be in violation of some fixed and settled rule."* [52] Just exactly what were the "fixed and settled" rules which no testator could abridge were never clear, and, indeed, seemed to vary. St. George Tucker thought them limited to such citadels of common-law construction as the rule

48 *Madden v. Madden's exrs* ., 2 Leigh 377, 380 (1830). See also *Wyatt v. Sadler's heirs ,* 1 Munford 537 (1810); *Carnagy v. Woodcock and Mackey,* 2 Munford 234 (1811).

49 *Kennon v. M'Roberts,* 1 Washington 96, 100 (1792).

50 *Fairclaim v. Guthrie ,* 1 Call 7, 15 (1797).

51 See also *Davies v. Miller,* 1 Call 127 (1797); *Kennon v. M'Roberts,* 1 Washington 96 (1792); *Johnson v. Johnson 's widow* ; 1 Munford 549 (1810); Stat, of Oct. 1785, c. 61, Hening, vol. 12, p. 140. For other cases where the testator's intent affected the application of a rule of law, see *Grijfith v. Thomas,* 1 Leigh 321 (1829) [rule against perpetuities]; *Tabb v. Archer,* 3 Hening & Munford 399 (1809); *Lupton v. Tidball,* 1 Randolph 194 (1822); *Henry St. George Tucker,* Commentaries, vol. 1, bk. 2, pp. 140- 142 [rule in Shelley's case]; *Harrison v. Allen,* 3 Call 289 (1802); *Hyer v. Shobe,* 2 Munford 200 (1811); *Henry St. George Tucker,* Commentaries, vol. 1, bk. 2, p. 146 [after-acquired lands, contingent interests].

52 *Goodrich* v. *Harding,* 3 Randolph 280, 282 (1825) (emphasis supplied). See also *Roy v. Garnett,* 2 Washington 9, 31 (1794); *Reno's exrs. v. Davis, 4* Hening & Munford 283, 291 - 292(1809).

against perpetuities (which forbade making property inalienable beyond a certain length of time) or the prohibition against devises in mortmain (that is, to religious institutions).[53] But in a series of cases adjudged between 1791 and 1803, we find the Court upholding rules of law against intention in a far wider variety of instances. Thus, despite the testator's apparent intention, the court strikes down the intended conveyance of after-acquired lands,[54] a 999-year lease,[55] and a remainder in land.[56]

The Court's struggles with the rule of law versus the intent of the testator is revealing regarding the prevailing attitude toward the common law. On the one hand, we see the Court willing to throw over the shackles of ancient law to give effect to the obvious desires of the individuals. In so doing, the Court was merely acknowledging a pragmatic reality of the Virginia countryside: unschooled men often made wills wherein their intent was clear, but whose language did not comport with all the legal niceties. The Court chose, where possible, to recognize that reality. On the other hand, the Court could not, *would* not, overthrow the familiar rules of common-law construction entirely. This was more than mere antiquarianism. Again, the Court of Appeals shied before the bugbear of unsettling property rights. As Judge Peter Lyons phrased the argument in 1803, "It is to no purpose to be arguing about the intention... for, mere intention cannot prevail against a settled rule of interpretation, which has fixed an appropriate sense to particular words; because, when the sense is once imposed, they become the indicia of the testator's mind, until the contrary is shown by countervailing expressions... It is better that it should be so, too, for the law ought to be certain; and, when the rule is once laid down, it should be adhered to. Otherwise, what is called liberality, at the bar, will degenerate into arbitrary discretion, and all must depend upon the will of the judge."[57] Once again we see that interesting mix of an abiding respect for the common law, leavened by the acknowledgment of the requirements of pragmatic reality. And through it all was woven the continuing support for fixed and settled rules of property.

Judge Lyons' concern that the law might "degenerate into arbitrary discretion, and all must depend upon the will of the judge,"[58] provides a key insight into why

[53] *St. George Tucker,* Blackstone's Commentaries, vol. 3, p. 381, n. 12.

54 *Shelton v. Shelton,* 1 Washington 53 (1791).

55 *Minnis* v. *Aylett,* 1 Washington 300, 302 (1794).

56 *Hill* v. *Burrow,* 3 Call 342 (1803). This case involved a "remainder in tail" which was an ongoing matter of judicial attention. It should be noted that the examples of a common-law rule overriding individual intention fell chiefly in the early decades of the period. It would be hasty to immediately jump to any conclusion on this score, however, since Canstates as late as 1825 the principle that rules of property can overturn intent. *Goodrich* v. *Harding,* 3 Randolph 280, 282 (1825).

57 *Hill* v. *Burrow,* 3 Call 342, 353 (1803).

58 *Ibid.* See also *Young* v. *Gregory,* 3 Call 446 (1803); *St. George Tucker,* Blackstone's Commentaries, vol. 1, p. 53, n. 10; *ibid.,* app. C, p. 133.

a republican commonwealth like Virginia would unhesitatingly accept an antique system of judge-made law derived from an essentially monarchical system. For the judicial opinions collectively known as the "common law" were *not* perceived as the collective opinions of appointed judges, but as reflections of a "higher" entity, and it was the nature of this "higher law" to be protective of individual rights and property. Indeed, it was only when a court threatened to deviate from the accepted notions of the "common law" that individual liberties and property rights were endangered.[59] This conception of law had been suggested by Coke, propounded by Locke, and elevated to a commonplace by Blackstone.[60] In Virginia, Spencer Roane admitted in 1803, "I hold myself bound by well-established precedents, and disclaim any power to change the law."[61] Such a position espoused the familiar doctrine of predictability in law, but it also contained an undercurrent of republicanism. Thus, to Virginians, adhering to the common law was more than just a bow to accepted wisdom, more than a means to avoid unsettling existing property rights; it was an affirmative statement of their belief in natural law and natural right, which in turn was a fundamental basis of traditional English, and hence American, liberties.[62]

In sum, the Revolution did not mean the overthrow of English jurisprudence in Virginia. Rather, "the great body of English law... remained intact in post-Revolutionary Virginia. Its rules and principles were the predominant authority relied upon in arguing and deciding cases .. .".[63] This is not to say that the common law was accepted unquestioningly. When the English cases did not suit the practical or ideological demands of Virginians, the Court did not hesitate to cast them aside. Henry St. George Tucker put it succinctly in 1831: "the common law of England is at this day the law of this commonwealth, except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of the country, or have been abrogated by the revolution and the establishment of free institutions."[64] Through it all, the Virginia Court of Appeals incorporated the English common law into the emerging jurisprudence of Virginia in a manner consistent with republicanism. In the great majority of cases, the influence of the English precedents

[59] *W. E. Nelson*, Americanization of the Common Law: The Impact of Legal Change in Massachusetts Society, 1760-1830 (1975), pp. 18-19; *Miller,* Life of the Mind, pp. 234-235; *Hobson,* ed., Selected Law Cases, p. lix.

60 *Miller,* Life of the Mind, pp. 130-131, 164- 165.

61 *Young* v. *Gregory,* 3 Call 446 (1803).

[62] When the Virginia court could find no appropriate precedent, it specifically looked to decide the matter "upon principle." See *Shelton* v. *Shelton,* 1 Washington 53, 64 (1791); *Kennon* v. *M'Roberts,* 1 Washington 96, 100 (1792); *Shaw* v. *Clements,* 1 Call 12, 429, 434, 436, 442 (1798); *Wilkinson* v. *Hendrick,* 5 Call 12- 13 (1804); *Bourke* v. *Granberry,* Gilmer 16, 25 (1820); *Richards* v. *Brockenbrough's admr.* , 1 Randolph 449, 454 (1823); *Blow* v. *Maynard,* 2 Leigh 29, 62 (1830).

[63] *Hobson,* ed., Selected Law Cases, p. 459.

64 *Henry St. George Tucker,* Commentaries, vol. 1, bk. 1, p. 9.

went unchallenged. When the English decisions were distinguished or overruled, the Court always articulated its reasoning for the exception. And, indeed, it is the exceptions that prove the rule. The willingness of the Virginia Court of Appeals to follow the common law when to do so protected individual liberties and predictability in social and economic relations, but to depart from English precedent when it seemed contrary to republican principles or to the circumstances of the new country, or, especially, to the will of the people voiced through statute, proved its commitment to a new order. For all this, however, there is a strain of conservatism in the attitude of the Court of Appeals toward the English heritage.[65] With the exception of occasional and necessary deviations, the commitment was to predictability and stability, which could best be achieved by conforming to the safe and familiar rules and procedures of the English common law.

Of course, as the decades progressed, an indigenous Virginia law also gradually developed, although, by 1830, the citations to Virginia cases were still outnumbered by those to their British counterparts.[66] It is an interesting study to review how the Virginia Court of Appeals treated Virginia precedent. Predictably, as a general rule, the ability to cite a Virginia decision as directly on point was a boon to any lawyer's argument.[67] But there appears an interesting dichotomy between the Court's treatment of the pre-Revolutionary General Court cases and the respect given the postwar decisions of the Court of Appeals. It was not uncommon for the Court of Appeals to disregard the decisions of the colonial (i.e. "royal") General Court. At one point the Court noted that "it has never been pretended that the decisions of the old General Court have been considered as conclusive."[68] Partially this was because, technically, the old General Court was not a court of last resort. It was left unstated, and therefore a matter of speculation, whether this disrespect had anything to do with that Court's close association with the hated colonial governors.[69]

The point about a willingness to overrule General Court cases should not be overstated. Consistent with our findings regarding the English common law, the stress was on continuity rather than change. Perhaps no case better displays the limited nature of the Revolution's impact on Virginia law than that of *Wallace* v. *Taliaferro ,* decided in 1800. That adjudication brought into question the binding power of precedents from the old General Court regarding property in slaves. Judge Roane was aghast at the very thought of questioning that line of cases. "I

[65] *Hobson,* ed., Selected Law Cases, p. 459.

66 *Ibid,*pp. 458-459. In volume 1 of *B. W Leigh,* Reports (1829), 151 English cases were cited, and 140 Virginia cases. For an example of Virginia precedent as determinative, see *Mickie* v. *Lawrence,* 5 Randolph 571, 573, 576 (1827); see also *Spencer* v. *Moore,* 4 Call 23 (1798).

[67] *Hobson,* ed., Selected Law Cases, p. 462.

68 *Claiborne* v. *Henderson,* 3 Hening & Munford 322, 375 (1809).

69 *Wallace* v. *Taliaferro,* 2 Call 447, 469, 489 (1800). See also *Pickett* v. *Claiborne, 4* Call 99 (1787); *White* v. *Johnson,* 1 Washington 159 (1793).

had supposed that no question would have been made of the competency of those decisions to fix rules of property in this country ... if we reject such rules of property as have been fixed by that court and under which our people have regulated their property through a long series of time, the mischief, which would ensue, is incalculable."[70] It was Judge Pendleton, however, who directly responded to any insinuation that the Revolution had engendered a change in the law of property in Virginia. Pendleton assumed that such cases had been brought "to discover if the Revolution had produced any change in the legal sentiment. Fortunately, for the peace of the country, the experiment failed, and the point was left at rest." The chief justice concluded: "I imagine some young gentleman of the bar, not old enough to know the practice of the country, nor acquainted with the former decisions, advised the suit.. .".[71] Nowhere can one find a better illustration of a Revolution admittedly fought for "liberty," but one in which, all the while, *property* rights were conservatively protected.

In any event, the Justices appeared even less likely to overrule the decisions of their own predecessors on the Virginia Court of Appeals. In an early case, Judge Pendleton felt he must offer an explanation for an apparent deviation from a recent adjudication. In *Jollife* v. *Hite,* he admitted that "Uniformity in the decisions of this Court is all important. We have, however, progressed but little from the commencement of our existence; and, if, in any instance, we should recently discover a mistake in a former decision, we should surely correct it, and not let the error go forth to our citizens, as a governing rule of their conduct."[72] As the decades progressed, the rare instance of the Court overruling a previous decision was without exception accompanied by such protestations as Judge Carr's in 1830: "I believe there are few men less disposed than myself to disturb the decisions of this court made by the enlightened judges who have gone before us. Cases, however, do sometimes arise in which our respect for their decisions must yield to a more imperious duty."[73]

The discussion thus far has neglected the reception greeted pre-Revolutionary English statutes in Virginia. That story is more straightforward. The same ordinance of May 1776, which accepted the English common law also adopted "all statutes or acts of Parliament made in aid of the common law prior to ... [1607]."[74] Here, too, the Virginia Convention evinced a willingness to rely heavily upon the English legal heritage. But, it is interesting to note the English statutes that were *not* adopted by the Virginia Convention in May 1776. By the specific language of the ordinance, English statutes passed since 1607 were not included.

70 *Wallace* v. *Taliaferro ,* 2 Call 447, 469 (1800).

71 *Id.* at 489.

72 *Jollife* v. *Hite ,* 1 Call 301, 328 (1798).

73 *Commonwealth* v. *Lilly's admr.* , 1 Leigh 525 (1830). See also *Boiling* v. *Mayor,* 3 Randolph 563,578 (1825).

74 Stat, of May 1776, c. 5, § 6, Hening, vol. 9, p. 127.

This had the disadvantage of eliminating salutary English laws passed since that date, but the theory was that most such statutes had already been adopted by the colonial legislatures or soon would be by the new General Assembly.[75] And this proved true enough. The new Virginia legislature did copy many prior English statutes, such as the statute of frauds,[76] making certain improvements where necessary.[77] The reception statute of 1776 also accepted only British statutes "which are of a general nature, not local to that kingdom .. .".[78] As St. George Tucker phrased it, this meant that some English enactments did not transfer because they were considered "obsolete, or have been deemed inapplicable to our local circumstances and policy."[79] Finally, and most importantly, the acceptance of British statutes was only "until the same shall be altered by the legislative power of this colony."[80] It was here that the most significant activity occurred, as the Virginia General Assembly undertook between 1776 and 1792 a "révisai" of the laws of Virginia which significantly altered both the common law and statute law of England as they had been originally adopted in May of 1776.[81] With the completion of the révisai in 1791, the General Assembly was evidently satisfied with its comprehensive nature because, in that year, it moved to repeal the ordinance of 1776 adopting the British statutes, and that thenceforth, "no such statute or act of parliament shall have any force or authority within this commonwealth."[82] In repealing the British legislation, the General Assembly sought to come full circle and exercise, in St. George Tucker's phrase, "the undisputed right which every free state possesses, of being governed by its own laws."[83] In doing so, however, the legislature in no way intended that its constituents should be deprived of any of the liberties which had been enjoyed under British law. To ensure that such would be the case, a caveat was inserted in the 1792 legislation preserving "all rights arising under any

75 C. *T. Cullen,* St. George Tucker and Law in Virginia, 1772-1804 (1987), p. 97.

76 English Stat, of 28 Car. II, c. 3 (1677); Stat, of Oct. 1785, c. 66, Hening, vol. 12, pp. 160-162.

77 Compare, e.g., the English Statute of Jeofails, 21 Jac. I, c. 13 (1626), and the Virginia Statute of Oct. 1789, c. 28, Hening, vol. 13, pp. 36-38. See *Stephens* v. *White,* 2 Washington 203, 210 (1796); *Braxton* v. *Winslow, 4* Call 308 (1791).

78 Stat, of May 1776, c. 5, § 6, Hening, vol. 9, p. 127.

79 *St. George Tucker,* Blackstone's Commentaries, vol. 1, p. xi.

80 Stat, of May 1776, c. 5, § 6, Hening, vol. 9, p. 127.

81 *C. T. Cullen,* Completing the Révisai of the Laws in Post-Revolutionary Virginia, in Virginia Magazine of History and Biography, vol. 82, pp. 84-99 (1974); *K. Preyer,* Crime, the Criminal Law, and Reform in Post-Revolutionary Virginia in Law and History Review, vol. 1, pp. 53-85 (1983), and *K. L. Hall,* ed. Crime and Criminal Law, pp. 653-685 (1987).

82 Va. Rev. Code (1803), c. 147, § 3. It should be noted that the English common law remained in effect. *St. George Tucker,* Blackstone's Commentaries, vol. 2, p. 467, n. 1; see *Southall* v. *Garner,* 2 Leigh 372, 376 (1830).

83 *St. George Tucker,* Blackstone's Commentaries, vol. 1, app. E, p. 406.

such statute or act ... and ... the right and benefit of all ... writs, remedial and judicial.. .".[84]

In its application of the English legal heritage to Virginia's new order, the Virginia Court of Appeals went a long way toward enunciating and defining the nature of Virginia's Revolutionary settlement. The first and most important attribute of this judicial settlement was the traditional and conservative nature of the court's approach to change in the legal traditions inherited from England. The reliance upon existing rules of law maintained the libertarian aspects of the English common law, but also had the effect of protecting property rights and thereby sustaining the existing social order.

The Court of Appeals, however, was not slavish in its devotion to English law. The most important exception to the court's usual loyalty to traditional legal rules occurred when the Virginia General Assembly overruled English statute or common law by statutory enactment. The court at all times deferred to the legislature in such instances, displaying a respect for the more "popular" (i.e. democratically elected) branch of republican government and its policy determinations. At the same time, the court continued to support traditional rules of law and property unless they were directly and unequivocally overruled by the General Assembly.

Moreover, the Virginia Court of Appeals displayed a distinctly pragmatic vein when it came to the application of English precedents. For example, it refused to do so when the results did not comport with the realities of Virginia's situation, or when the technical rules of the common law yielded an unreasonable result.

In all of this, one fact emerges as particularly striking. Throughout the period stretching from the Revolution to 1830, the Court of Appeals displayed a remarkable consistency in its approach to the salient issues which arose. The court displayed a like respect for traditional rules of law in the 1790s as in the 1830s. Similarly, respect for statutory pronouncements spanned the decades under study, and the same continuity can be seen in the other topics discussed. Indeed, in all areas, examples of judicial attitudes can be drawn as easily from the early nineteenth-century reports as from those of the late eighteenth century. It is significant that, in 1830, the Court of Appeals was evincing a judicial approach nearly identical to that of forty and fifty years earlier. This doctrinal stability in the face of social and economic change in the Commonwealth would loom as important as many of the court's substantive pronouncements.

A corollary to these conclusions pertains to the evolving role of the Court of Appeals. In the decades between the Revolution and 1830, the court became a key player in the process of defining the nature of Virginia's adaptation to its new status as a republican commonwealth free from the dictates of English law and policy. Perhaps no other institution made a greater contribution to the complex task of

84 Va. Rev. Code (1803), c. 147, §§ 3, 5.

interweaving the threads of the English legal heritage into the fabric of a republican legal system. Thus, by 1830, not only had the Virginia Court of Appeals played a pivotal role in establishing and defining Virginia's new constitutional order, but it had also been instrumental in adapting the inherited English legal system to a republican commonwealth.